IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-28

HAROLD S. GOLDEN, *et al., Petitioners,*

v.

BISCAYNE BAY YACHT CLUB, *et al., Respondents.*

**MOTION OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND BRIEF AMICUS CURIAE**

RICHARD B. SOBOL
*Attorney for Amicus Curiae*
1520 New Hampshire Avenue, N.W.
Washington, D. C. 20036

*Of Counsel:*

ARNOLD FORSTER
Anti-Defamation League of B'nai B'rith
315 Lexington Avenue
New York, New York 10016

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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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The Anti-Defamation League of B'nai B'rith respectfully moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the accompanying brief *amicus curiae* in support of the petition for a writ of certiorari in this matter. Movant has not been able to secure the consent of the parties for the filing of the attached brief.

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of the parent organization to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States.

Among its many other activities directed to these ends, the Anti-Defamation League has in the past filed briefs as *amicus* in this Court urging the unconstitu-

tionality or illegality of various laws and practices which discriminate on grounds of religion or race in such cases as, e.g., *Shelley* v. *Kraemer,* 334 U.S. 1 (1948); *Sweatt* v. *Painter,* 339 U.S. 629 (1950); *Brown* v. *Board of Education,* 347 U.S. 485 (1954); *Colorado Anti-Discrimination Commission* v. *Continental Airlines, Inc.,* 372 U.S. 714 (1963); *Sherbert* v. *Verner,* 374 U.S. 398 (1963); *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968); *Sullivan* v. *Little Hunting Park, Inc.,* 396 U.S. 229 (1969); *De Funis* v. *Odegaard,* 416 U.S. 312 (1974); *McDonald* v. *Santa Fe Transportation Co.,* 96 S.Ct. 2574 (1976), and *Runyon* v. *McCrary,* 96 S.Ct. 2586 (1976).

As one of the nation's oldest civil rights and human relations agencies, and one which is concerned with the rights of all people, the Anti-Defamation League respectfully offers this Court its analysis of the issues raised in this case. The League seeks to file a brief *amicus curiae* because is believes the decision below weakens the prohibition against governmental assistance to private racial and religious discrimination that has been established by the decisions of this Court.

Respectfully submitted,

RICHARD B. SOBOL
*Attorney for Amicus Curiae*
1520 New Hampshire Avenue, N.W.
Washington, D. C. 20036

*Of Counsel:*

ARNOLD FORSTER
Anti-Defamation League of B'nai B'rith
315 Lexington Avenue
New York, New York 10016

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## BRIEF OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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### QUESTION PRESENTED

Whether the Fourteenth Amendment prohibits racial and religious discrimination by an organization receiving financial support from a state agency.

### INTEREST OF AMICUS

The interest of *amicus* is stated in the Motion for Leave to File Brief *Amicus Curiae, supra.*

## STATEMENT

The onshore facilities of the Biscayne Bay Yacht Club are located on land owned by the Club and fronting on Biscayne Bay in Coconut Grove, Miami, Florida. The docks of the Club are constructed on adjacent bay bottom land owned by the City of Miami and leased to the Club for $1.00 a year.[1] The district court found that the bay bottom land is essential to the functioning of the Club as a yacht club. App. 67. The docks provide mooring for boats of members of the Club, but the general public is prohibited from using these facilities. *Id.*

From its inception in 1887, the Club has never had a black or a Jewish member. Although the membership procedures of the Club do not expressly exclude blacks or Jews, there is a requirement of sponsorship by three members and a right of veto of a prospective membership by any three members of the Club's Board of Governors. The district court found that, in practical effect, these procedures "deny Blacks and Jews any meaningful opportunity for membership." App. 73. This finding was not disturbed by the court of appeals. App. 16-17.

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[1] The Club purchased the land on which its onshore facilities are now located in 1932. The adjacent bay bottom land was acquired by the City in 1949 by a deed from the Trustees of the Internal Improvement Fund of the State of Florida. Appendix to Petition (hereinafter "App.") 66. The City did not assert title to the bay bottom land until 1962, at which time the $1.00 a year lease was executed. *Id.*

The Club has never challenged the validity of the City's title to the bay bottom land, App. 66, n.2, and the case was decided by the courts on the assumption that the City's title is valid. App. 12.



Plaintiffs Golden and Fincher are a Jew and a black, who sought admission to the Club, but were refused on the ground that their membership could not be considered without the requisite sponsorship. Thereafter, they instituted suit in district court, pursuant to 42 U.S.C. § 1983, challenging the admissions policy of the Club under the Fourteenth Amendment. The district court found that, under the facts of the case, a "symbiotic relationship" existed between the City and the Club, making the Club's discriminatory membership policies violative of the Fourteenth Amendment. App. 72. The court issued an injunction which simply prohibited the Club from discriminating in membership on grounds of religion or race. App. 75.

On appeal, the decision of the district court was affirmed a divided panel. App. 41-64. Rehearing on *en banc* was granted, and the full court by a vote of 9-5, reversed the decision of the district court. App. 1-40. The petition to this Court for a writ of certiorari followed.

## REASONS WHY THE WRIT SHOULD BE GRANTED

### I. The Decision of the Court Below Is in Conflict with the Applicable Decisions of This Court

The overriding consideration in this case is that essential facilities of the Club are located on publicly owned land, which is made available to the Club for its exclusive use at a nominal charge. As Chief Judge Brown stated in his dissenting opinion below:

> "This was a lease of waterbottom land abutting very valuable property—we can take judicial notice that this lease was worth considerably more than $1.00 and thus that the financial accommodation here had the same effect as would a fair mar-

> ket value lease combined with a large subsidy given from the city to the club." App. 39.[2]

Thus, this case involves financial support by a state agency to a private organization that discriminates in its membership policies on grounds of race and religion.

This Court has uniformly held that governmental assistance— either in the form of money or other valuable goods or facilities—to private groups that engage in invidious discrimination violates Fourteenth Amendment rights. See *Gilmore* v. *Montgomery*, 417 U.S. 556 (1974); *Norwood* v. *Harrison*, 413 U.S. 455 (1973); *Brown* v. *South Carolina Board of Education*, 296 F. Supp. 199 (D.S.C.), *aff'd per curiam*, 393 U.S. 222 (1968); *Poindexter* v. *Louisiana Finance Assistance Comm'n*, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968).[3]

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[2] The panel majority in the Court of Appeals stated that "the City provided substantial financial aid to the Club by making the bay bottom land available for the token rental of $1.00 per year." App. 54. The majority opinion for the *en banc* court states that "[i]f the District Court considered this point it failed to mention it and made no finding that the city contributed in any way, substantial or otherwise, to the financial support of the club." App. 4. But the district court did find that the land was leased to the club for $1.00 a year. App. 66. And surely Chief Judge Brown is correct that a reviewing court can take judicial notice that $1.00 a year is not adequate consideration for a substantial tract of bottom land in Biscayne Bay offshore of Coconut Grove in the City of Miami.

[3] See also *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964). Tax exemptions to organizations engaging in invidious discrimination have also been prohibited. See *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd*, 404 U.S. 997 (1971) (segregated private schools); *McGlotten* v. *Connally*, 338 F. Supp. 448 (D.D.C. 1972) (segregated private clubs).



In *Norwood* v. *Harrison, supra*, the State of Mississippi, pursuant to statute, provided free textbooks to every school child in the state, regardless of the school attended. This Court held the Mississippi program unlawful insofar as it provided free textbooks to children attending private schools which exclude black children.

> An inescapable educational cost for students in both public and private schools is the expense of providing all necessary learning materials. When, as here, that necessary expense is borne by the State, the economic consequence is to give aid to the enterprise; if the school engages in discriminatory practices the State by tangible aid in the form of textbooks thereby gives support to such discrimination. Racial discrimination in state-operated schools is barred by the Constitution and "[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Lee* v. *Macon County Board of Education*, 267 F.Supp. 458, 475-76 (M.D. Ala. 1967).

413 U.S. at 464-65.

*Gilmore* v. *Montgomery, supra*, involved the use of city park facilities by segregated private schools and by other non-school groups that excluded blacks. The Court held that the city's allotment of public recreation facilities to private segregated schools on a temporary, but exclusive, basis constituted governmental support to private schools in violation of the Fourteenth Amendment. 417 U.S. at 569. The court also indicated that the temporary exclusive use of city park facilities by non-school groups which engage in invidious discrimination violates Fourteenth Amendment rights, see 417 U.S. at 574; *Id.* at 579-80

(Mr. Justice Brennan, concurring); *Id.* at 582 (Mr. Justice White, concurring), although the Court did not render a decision on this question because of the inadequacy of the factual record presented.

The decision below conflicts with these decisions. Indeed, there is a stronger basis for the application of Fourteenth Amendment restraints in this case than there was in *Norwood* or *Gilmore*. In *Norwood*, Mississippi supplied free textbooks to every school child in the state. There is no counterpart in this case to this equality in the provision of governmental assistance. To the contrary, the district court found that there is an acute shortage of mooring facilities in the City of Miami. App. 73-74. In *Gilmore*, the exclusive use condemned by the Court was limited to a few hours at a time; here, it is indefinite. And the use of public land is not incidental to the functioning of the Club, it is, as the district court found, essential to its very existence. App. 67.

The case for the application of Fourteenth Amendment restrictions is also stronger here than in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961). Both in *Burton* and in this case there is a lease of public property to a private entity engaged in invidious discrimination. But in *Burton*, the restaurant was paying the state the fair market value for the leasehold. The Court in *Burton* stressed the benefit to the state flowing from lease arrangement with the restaurant, and held that the state may not profit from racial discrimination. 365 U.S. at 723-724. Here, the benefit flows not to the state, but from the state to the Yacht Club. It seems far clearer that the Fourteenth Amendment prohibits state support of private organizations that engage in invidious discrimination, than that it prohibits the government from deriving any benefit from the operations of such an organization. *Cf. Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972); *Green* v. *Connally, supra.*[4]



The opinion in this case of the majority of the *en banc* court depended heavily on the absence of "significant state involvement in the membership policies of the private club."[5] But the decisions of this Court

[4] There are facts in this case additional to the nominal-fee lease of public land that support the district court's finding of state action. *First*, the deed granting the bay bottom land to the City, see note 1, *supra*, restricted the use of the land "solely for public purposes." App. 67. In 1969, when the Club proposed to construct docks and piers on this land, the City secured a waiver of the use restriction from the original grantor. The waiver was granted on the ground that this construction would benefit the public, in that it would "help relieve the acute shortage of public dock facilities existing in the City of Miami." App. 67. *Second*, the City of Miami Code prohibits any lessee of city-owned property from discrimination on the basis of race or religion, or, where the lessee is a club, from requiring sponsorship as a condition of club membership. Miami Fla. Code § 38-9.1, 9.2; see App. 67-68. As required by the Code, § 38-9.3, the Yacht Club, in its lease, agreed to comply with the requirements of these ordinances App. 68. *Third*, the City has long been aware of the Club's breach of this agreement. See App. 21-29.

[5] There are at least five instances in which the majority opinion below relies on the city's non-involvement in determining the membership policies of the Club:

> "Upon a thorough sifting of the facts and circumstances of this case, we are of the opinion that the bay bottom lease did not supply the requisite Fourteenth Amendment significant state involvement in the membership policies of the private club."

App. 3.

> "The city had no part, and took no part, in the operations or internal policies of the club."

App. 3.

clearly establish that private discriminatory conduct may be subject to Fourteenth Amendment restraints, regardless of whether a state agency had a role in actually setting the discriminatory policies.

> "Under *Burton* v *Wilmington Parking Authority*, . . . . it is perfectly clear that to violate the Equal Protection Clause the State itself need not make, advise, or authorize the private decision to discriminate that involves the State in the practice of segregation. . . . ."

*Gilmore* v. *Montgomery, supra,* 417 U.S. at 582 (Mr. Justice White, concurring,) See also *Norwood* v. *Harrison, supra.* The court below thus appears to have arrived at the wrong answer because it asked the wrong question. Rather than focussing on state support to a private entity that discriminates, which has been consistently struck down by this Court, the court focussed on the state's non-involvement in setting the discriminatory policy, which has not been deemed a dispositive factor by this Court. In light of the undoubted public importance of a clearly expressed judicial application of the Fourteenth Amendment against state support of private discrimination, the error of the decision below should be corrected by this Court.

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"[T]he city played no part whatever in the membership policies of the club."
App. 10-11.

"The City of Miami has not significantly involved itself in [the Club's] membership policies."
App. 14.

"[The District] Court found as a fact that the existence of the lease was the sole nexus between the City of Miami and the Biscayne Bay Yacht Club. The Court further held that this, alone, amounted to significant state involvement with the club and its membership policies.

For all the reasons hereinabove articulated we must disagree."
App. 17.



**II. Alternatively, the Court Below Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court**

We have argued that the decision below is in conflict with the decision of this Court in such cases as *Norwood* v. *Harrison, supra,* and *Gilmore* v. *Montgomery, supra.* These decisions, however, in substantial part, involved state assistance to private segregated schools which were established for the purpose of circumventing the desegregation of the public schools, and it may be that they are controlling only in that situation.[6]

If these decisions are so limited, then the question decided by the court below has not been decided by this Court. This Court has never held the Fourteenth Amendment inapplicable where a state agency provides valuable support to a private organization that engages in invidious discrimination.

The decision of this Court in *Moose Lodge No. 107* v. *Irvis, supra,* does not resolve the question presented in this case. In *Moose Lodge,* and in *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345 (1974), the Court held that Fourteenth Amendment restrictions do not become applicable to private entities merely by virtue of state regulation or licensing, or by the provision of normal state services such as water, sewage and police and fire protection. In his opinion for the Court in *Moose Lodge,* Mr. Justice Rehnquist stressed that the Lodge operated on property wholly owned by it, and

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[6] In *Norwood,* the opinion of the Court specifically disclaimed impairment of the school desegregation process as a basis for its decision. 413 U.S. at 467-68. In *Gilmore,* the Court did rely on interference with outstanding orders for the desegregation of the public schools and for the desegregation of the public parks. 417 U.S. at 569, 570.

that it did not receive any public support, other than normal municipal services. 407 U.S. at 171, 173, 175. Here, no reliance is placed on state licensing or regulation, or on the provision of normal services. The central facility of the Yacht Club—its docks—are located on public property leased to the club at nominal cost. This is not a service routinely made available by the City of Miami.

The public importance of delineating the constitutional limits on state support for private groups engaged in invidious discrimination is obvious. If the question presented in this case is not answered by *Norwood*, *Gilmore* and related decision, then it has not been, but should be, decided by this Court.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD B. SOBOL
*Attorney for Amicus Curiae*
1520 New Hampshire Avenue, N.W.
Washington, D. C. 20036

*Of Counsel:*

ARNOLD FORSTER
Anti-Defamation League of B'nai B'rith
315 Lexington Avenue
New York, New York 10016

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